No. 81-5195

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was deprived of liberty without due process of law by his commitment to a hospital for treatment resulting from his acquittal on a criminal charge on grounds of insanity or by the procedures governing the continuation of his commitment.

2. Whether principles of equal protection require that an individual, committed to a mental hospital following an acquittal, based upon an affirmative finding of insanity, at his trial on criminal charges, be released upon expiration of the maximum prison sentence he could have received if convicted of the criminal act he performed, unless he is recommitted under the separate civil commitment procedure.

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OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. A) and the opinion of the panel upon rehearing (Pet. App. B) are reported at 396 A.2d 183 and 411 A.2d 624, respectively. The opinion of the en banc court of appeals (Pet. App. C) is reported at 432 A.2d 364.

JURISDICTION

The judgment of the en banc court of appeals was entered on May 29, 1981. The petition for a writ of certiorari was filed on August 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATEMENT

1. The facts and procedural history of this case are set forth in the opinion of the en banc court of appeals (Pet. App. C 2-5). Briefly, petitioner is a patient at St. Elizabeths

Hospital in the District of Columbia, where he has been committed as a dangerously insane individual since March 1976, pursuant to D.C. Code 24-301(d). 1/ His commitment resulted from a charge of

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1/ D.C. Code 24-301(d), which governs the commitment of persons found not guilty by reason of insanity in the District of Columbia (acquittees), provides:

> (1) If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e).
>
> (2) A person confined pursuant to paragraph (1) shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. At the conclusion of the criminal action referred to in paragraph (1) of this subsection, the court shall provide such person with representation by counsel -
>
> > (A) in the case of a person who is eligible to have counsel appointed by the court, by continuing any appointment of counsel made to represent such person in the prior criminal action or by appointing new counsel; or
> >
> > (B) in the case of a person who is not eligible to have counsel appointed by the court, by assuring representation by retained counsel.
>
> If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within ten days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such an order as may appear appropriate.

Under D.C. Code 24-301(e), a person is entitled to unconditional release from St. Elizabeths upon certification by (Continued)

attempted petit larceny brought against him in September of 1975. Following a pretrial commitment to St. Elizabeths for a court-ordered competency examination, 2/ and waiver of his right to a jury trial, petitioner was acquitted by reason of insanity in a bench trial upon stipulated facts in the Superior Court of

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the Superintendent of St. Elizabeths Hospital that the individual has recovered his sanity and will not be dangerous to himself or others. If the prosecuting authority objects to release upon such a certification, the court must hold an evidentiary hearing to determine whether "such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others" and must order release if it so finds. Ibid. The court may elect to hold such a hearing sua sponte as well, upon receipt of a release certification. The statutory standard has been construed to require that there "be freedom from such abnormal mental condition as would make the individual dangerous to himself or the community, in the reasonably foreseeable future." Overholser v. Leach, 103 U.S. App. D.C. 289, 292, 257 F.2d 667, 670 (1958) [footnotes omitted], cert. denied, 359 U.S. 1013 (1959), overruled in other respects, Bolton v. Harris, 130 U.S. App. D.C. 1, 12, 395 F.2d 642, 653 (1968); see United States v. Brawner, 153 U.S. App. D.C. 1, 41-42, 471 F.2d 969, 1009-1010 (1972) (en banc). Conditional release may be obtained upon certification by the Superintendent, subject to judicial review as described above, that the patient's recovery has advanced to the point that the conditions prescribed suffice to assure that the patient "will not in the reasonable future be dangerous to himself or others," Hough v. United States, 106 U.S. App. D.C. 192, 195, 271 F.2d 458, 461 (1959). See also United States v. Ecker, 177 U.S. App. D.C. 31, 37, 47-52, 543 F.2d 178, 184, 194-199 (1976), cert. denied, 429 U.S. 1063 (1977).

Section 301(k) provides a committed individual the right to initiate a judicial proceeding to determine his right to release. D.C. Code 24-301(g) also provides for release upon writ of habeas corpus. Under either procedure initiated by a committed acquittee, as in the release hearing prescribed under D.C. Code 24-301(d)(2), the burden of proving eligibility for release, by a preponderance of the evidence, is placed upon the patient. D.C. Code 24-301(k); Bolton v. Harris, supra, 130 U.S. App. D.C. at 12, 395 F.2d at 653 (1968). The assignment of the burden of proof in Section 301(e) proceedings is less clearly established. See United States v. Ecker, supra, 177 U.S. App. D.C. at 44-47, 543 F.2d at 191-194 (Wilkey, J.), 177 U.S. App. D.C. at 53-54, 543 F.2d 200-201 (Lumbard, J.), 177 U.S. App. D.C. at 55-56 & notes 5 and 6, 543 F.2d at 202-203 & notes 5 and 6 (Wright, J.).

2/ See D.C. Code 24-301(a). The examining psychologist reported that petitioner was competent to stand trial, but had "signs and symptons of a severe mental disorder, including auditory hallucinations," warranting hospitalization at St. Elizabeths for treatment (Pet. App. C 4 n.3).

the District of Columbia; the stipulation showed both that he had committed the crime and that the crime resulted from his mental illness. By operation of law (D.C. Code 24-301(d)(1)), petitioner was initially committed for treatment to St. Elizabeths Hospital upon his acquittal. On May 25, 1976, following the statutory "50-day release hearing," the court ordered petitioner's further confinement at St. Elizabeths because he had failed to prove by a preponderance of the evidence that he was no longer mentally ill or dangerous to himself or others. 3/

At a second hearing, on November 29, 1976, petitioner asserted that he was entitled to immediate release from the hospital unless civilly committed, because the maximum prison sentence that he could have received had he been convicted of the crime charged (one year's imprisonment) had expired. Petitioner argued that failure at that juncture to afford him the procedures applied to persons whom the government seeks to commit by civil process denied him equal protection of the laws guaranteed by the

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3/ In an April 23, 1976, letter to the court, the Superintendent of St. Elizabeths stated that petitioner was suffering from schizophrenia, paranoid type, and was receiving medication. He added that "Mr. Jones is in need of further hospitalization, and by virtue of his mental illness, he would be a danger to himself and to others if released into the community at this time" (Pet. App. C 5 n.5).

Due Process Clause of the Fifth Amendment. 4/ After a further hearing in February of 1977, the court denied the requested relief and directed petitioner's continued confinement at St. Elizabeths. 5/

4/ The procedures governing civil commitment in the District of Columbia are contained in D.C. Code 21-541 et seq. Civil commitment may be ordered after a hearing at which the petitioner (usually the Superintendent of St. Elizabeths Hospital) must prove by clear and convincing evidence (to a jury if the respondent requests one) that the respondent is both mentally ill and dangerous to himself or others. D.C. Code 21-545(b); In re Nelson, 408 A.2d 1233 (D.C. App. 1979). Prior to this Court's decision in Addington v. Texas, 441 U.S. 418 (1979), the required quantum of proof was held to be proof beyond a reasonable doubt. See In re Hodges, 325 A.2d 605 (D.C. App. 1974); In re Ballay, 157 U.S. App. D.C. 59, 482 F.2d 648 (1973). In re Nelson, supra, announced the present standard, formulated in light of Addington.

Release from civil commitment may be secured by any of several procedures. First, the chief of service of the hospital with custody is obliged to examine all committees at intervals no greater than every six months, and to release those who no longer meet the statutory standard for commitment. D.C. Code 21-548. If release is not initiated by the hospital, a patient or his representative may, periodically, secure an examination by hospital physicians, and by an independent physician. D.C. Code 21-546. The chief of the hospital service may determine that the committee is to be released upon the basis of these reports. Ibid. If he concludes otherwise, but one of the examining physicians dissents from his decision, the patient is authorized to petition the court for release pursuant to D.C. Code 21-547. Finally, a patient may seek release upon a petition for a writ of habeas corpus, by demonstrating that the statutory standard for commitment is no longer satisfied. D.C. Code 21-549. The burden of establishing the right to release, by a preponderance of the evidence, is assigned to the patient. Bolton v. Harris, supra, 130 U.S. App. D.C. at 12, 395 F.2d at 653.

5/ Petitioner subsequently moved for his unconditional release under D.C. Code 24-301(k) (see note 1, supra) but the motion was denied. Three months later, he was granted conditional release on terms recommended by the St. Elizabeths' staff, which allowed him to make daytime and overnight visits into the community (see D.C. Code 24-301(e)). He was also admitted into the civil division of the hospital, although as a result of disruptive behavior he was retransferred to the forensic division. Following the second decision by the panel of the court of appeals (see text, infra), petitioner was unconditionally released from St. Elizabeths, but he was subsequently recommitted to the hospital and remains there at the present time.

2. Petitioner appealed from this order and renewed his contention that the Constitution required that he be released from the hospital upon the expiration of his hypothetical maximum sentence unless the government invoked the procedures for civil commitment. A panel of the court of appeals initially rejected this argument (Pet. App. A) 6/ but later granted rehearing and reversed itself. The panel ultimately held that the purpose of commitment of an insanity acquittee under D.C. Code 24-301(d) is "partially punitive," that commitment on these terms justifies the confinement of acquittees for treatment only until their hypothetical maximum sentence has expired; and that no basis exists thereafter for denying them the protection of the

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6/ Before the panel, petitioner did not challenge the validity of his initial commitment, but only the continuation of his commitment after expiration of the maximum sentence he could have received if convicted (see Pet. App. A 2, 4; Pet. App. B 2-4). In its initial opinion the panel also took petitioner to concede that the Section 301(d) procedure constituted a means of determining the presence of mental illness and whether or not he was dangerous that was comparable, for constitutional purposes, to the civil commitment procedure--i.e., that the procedural differences between the Section 301(d)(2) release hearing and the civil commitment procedure were rationally related to the different situations in which insanity acquittees and potential civil committees found themselves, and were not based upon a punitive motive (Pet. App. A 8, 13-14). Given this premise, the court concluded that "the length of a hypothetical prison term has no relationship to the rehabilitative goal of hospital confinement" and accordingly denied petitioner's request for immediate release (id. at 15). The court added (Pet. App. A 16), however, that equal protection requires that committed insanity acquittees be examined every six months by the Superintendent or his subordinates for the purpose of determining whether such patients are eligible for release under Section 301(e), a procedure prescribed by statute only for civil committees. See notes 1 and 4, supra.

Judge Mack concurred in the judgment (Pet. App. A 17) on the understanding that the panel had not reached constitutional questions as to the procedures surrounding the commitment of persons acquitted of criminal charges by reason of insanity.

procedure for civil commitment (Pet. App. B 11-15). 7/ The panel accordingly directed release of petitioner unless de novo civil commitment proceedings were initiated, leading to a new commitment order (id. at B 14). The en banc court of appeals reversed the panel decision, however, and upheld the trial court's order (Pet. App. C). 8/ The court concluded, first, that "there is no basis for finding §301(d) punitive in any respect," holding that its purposes are "exclusively remedial and protective" and that "punitive rationale has no part in the commitment of persons acquitted by reason of insanity" (Pet. App. C 6-12). Moreover, the court stated (Pet. App. C 8 to C 10; footnote omitted):

> [P]lain reason compels rejection of [petitioner's] reliance on his hypothetical maximum prison term as artificial and meaning-

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7/ On rehearing petitioner persuaded the panel that it had misconstrued his argument in its original opinion (see note 6, supra). He asserted that he had assumed, arguendo, the adequacy of the basic Section 301(d) procedure only on the understanding that the procedural differences between it and the civil commitment procedure were permissible precisely because of the partially punitive nature of the commitment of insanity acquittees. He argued further that it was just this aspect of the Section 301(d) commitment which made continuation of the confinement decreed thereunder impermissible once the hypothetical maximum permissible sentence had expired (Pet. App. B 4-7). In its opinion on rehearing, a divided panel agreed with petitioner that the difference between the Section 301(d) release hearing and the civil commitment procedure could not be justified by considerations apart from a punitive rationale and that commitment of insane acquittees accordingly had a partially punitive rationale (id. at 12-13). The court concluded that the punitive rationale for disparate treatment was extinguished by the expiration of the maximum hypothetical sentence "since that term marks the end of society's claim on that individual for any kind of punishment" (id. at 14). Upon rehearing the panel did not address the question raised in its first opinion, seemingly sua sponte, whether periodic examinations of insanity acquittees, similar to those prescribed by statute for civil committees, are required by considerations of equal protection. See note 6, supra.

Judge Mack concurred in the judgment (Pet. App. B 15) and Judge Kelly dissented (id.), adhering to the initial panel decision.

8/ Three judges dissented (Pet. App. C 25-37), adhering to the conclusion reached by the panel on rehearing.

> less. Statutory maximum sentences have no relationship to the purpose of mental care and treatment. They are intended rather, to set the outer boundaries of lawful punishment for persons found criminally responsible for specified offenses. * * * Subsection 301(d) commitments are neither expressly nor impliedly related to statutory maximum sentences. To the contrary, §301(d) contemplates an indeterminate period of confinement and treatment, depending on when the patient has recovered his sanity or no longer poses a danger to himself or others. * * *
>
> [R]eference to either a hypothetical maximum prison sentence, or even to a judically limited commitment term would completely refute the statutory purpose of §301(d) and would frustrate any attempt at treating and rehabilitating mental patients who happen to have been acquitted of crimes by reason of insanity.

The court then rejected petitioner's contention that his commitment under Section 301(d) denied him equal protection of the laws because it was based on procedures less protective than those afforded persons who have been civilly committed. At the outset the court stressed that both forms of commitment prescribed by law in the District of Columbia provide "the essential due process rights associated with involuntary commitment" (Pet. App. C 15-16). 9/ The court identified three differences between the two statutory schemes for commitment: (1) the unavailability of a jury trial at the 50-day hearing under Section 301(d)(2); (2) the shift of the burden of proof to the acquittee under Section 301(d)(2); and (3) the different quantum of proof required for commitment under Section 301(d)(2). 10/ Each feature of the criminal commitment process

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9/ According to the court, D.C. Code 24-301(e) establishes the substantive standard for commitment under Section 301(d): a showing of mental illness and dangerousness "identical" to that required by D.C. Code 21-545(b) in civil commitment proceedings. In addition, both procedures mandate a judicial hearing and determination, and notice, and provide for assistance of counsel, to be appointed by the court if necessary (Pet. App. C 13).

10/ The court noted (Pet. App. C 17) that it had not considered any differences in post-commitment procedures. See notes 1 and 4, supra. Any such differences were deemed to lie outside the scope of the petitioner's argument. Compare notes 6 and 7, supra.

was held to be justified by the exceptional procedural posture of persons who have been acquitted of a criminal offense by reason of insanity (Pet. App. C 17-22).

The court concluded that the unavailability to an acquittee in a 50-day release hearing of the jury trial afforded to potential civil committees is "justified by the fact that the acquittee has had right to jury determination of his sanity at the time of the offense" (Pet. App. C 17-18). The court noted that "the acquittee's illness is initially established by affirmative proof," adding that dangerousness is no less validly established by proof that the defendant committed the criminal act, a finding necessarily underlying an acquittal by reason of insanity" (Pet. App. C 18). The court accordingly held that "[t]he fact that [petitioner's present] mental illness and dangerousness are not jury determined, but derived from a prior jury finding, is not significant since the continuation of these attributes is a rational and permissible evidentiary presumption" (Pet. App. C 18; footnote omitted).

The court also upheld the shift of the burden of proof to the acquittee in the 50-day release hearing (Pet. App. C 20-21):

> It is entirely rational for the District [of Columbia] to require an acquittee to prove his entitlement to release where he was the one to advocate the fact of his past insanity. Automatic § 301(d) commitment does not follow an acquittal by reason of insanity when the question of insanity is raised by the court or the prosecutor, rather than the defendant. United States v. Wright, 167 U.S. App. D.C. 309, 511 F.2d 1311 (1975). As mentioned above, the presumption that a mental condition continues is a reasonable one and it is also reasonable to require the person who raised the presumption to refute it by affirmative proof. Furthermore, whatever difference in risk allocation there might be between the two statutes as a result of who bears the burden of proof is minimized by the fact that when the acquittee bears the burden, he need prove entitlement to release by only a preponderance of the evidence, the lowest standard of proof, whereas when the government bears the burden, it must prove insanity and dangerousness by a higher standard, namely that of clear and convincing evidence. In re Nelson, D.C. App., 408 A.2d 1233 (1979).

Finally, the court rejected petitioner's contention that the differing levels of proof under the two procedures violates equal protection (Pet. App. C 21-22; footnote omitted):

> An acquittee's past insanity is proven by a preponderance of the evidence. His present insanity is determined by his failure to rebut, by a preponderance of the evidence, the presumption of continuing insanity. In contrast, a committee's detention is based on clear and convincing evidence of mental illness and dangerousness. In re Nelson, supra. The difference between those two standards is justified by the fact that Congress determined that a defendant raising an insanity defense should not have to meet a higher burden on such a relatively difficult issue. However, when the District [of Columbia] seeks to commit a person who is disputing the fact of insanity or dangerousness, it is reasonable that the risk of error be more heavily thrust upon the government. See Addington v. Texas, [441 U.S. 418 (1979)].

ARGUMENT

Petitioner contends that his commitment pursuant to D.C. Code 24-301(d) following his acquittal on a criminal charge by reason of insanity denied him due process and was inconsistent with Addington v. Texas, 441 U.S. 418 (1979), because he had not been proven committable by clear and convincing evidence. He further contends that his continued confinement beyond the maximum prison sentence he could have received had he been convicted, denies him equal protection of the laws, unless it is based upon a fresh determination of committability under the procedures afforded at the outset to those who are involuntarily civilly committed. Both contentions are unfounded.

Petitioner was committed under a comprehensive scheme fashioned by Congress for the adjudication of claims of insanity raised as a defense to a criminal charge and for the evaluation and treatment of persons who have successfully raised the

insanity defense (hereinafter "insanity acquittees"). See Lynch v. Overholser, 369 U.S. 705 (1962). 11/ The court of appeals correctly concluded that Section 301(d) provides insanity acquittees with procedural protections that are constitutionally adequate and that are not impermissibly different from those

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11/ D.C. Code 24-301(d) was amended by Congress in 1955 to provide for automatic commitment of acquittees, in response to the decision in Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954), which was perceived as broadening the insanity defense and, absent remedial legislation, making possible the release of dangerously insane individuals found to lack criminal responsibility. See Lynch v. Overholser, supra, 369 U.S. at 715; Ragsdale v. Overholser, 108 U.S. App. D.C. 308, 312, 281 F.2d 943, 947 (1960).

Prior to 1970, a person could be acquitted of a crime by reason of insanity in the District of Columbia if the government failed to prove his sanity at the time of the crime beyond a reasonable doubt--the rule generally applicable to federal prosecutions. Davis v. United States, 160 U.S. 469 (1895); see Leland v. Oregon, 343 U.S. 790, 797 (1952). In 1970, as part of the District of Columbia Court Reform and Criminal Procedure Act, Pub. L. 91-358, 84 Stat. 473, Congress made insanity an affirmative defense in the District of Columbia, requiring the defendant to plead and to prove by a preponderance of the evidence that he was insane at the time of the criminal act and that his insanity caused the act. D.C. Code 24-301(j); see Bethea v. United States, 365 A.2d 64 (D.C. App. 1976), cert. denied, 433 U.S. 911 (1977); United States v. Greene, 160 U.S. App. D.C. 21, 489 F.2d 1145 (1973), cert. denied, 419 U.S. 977 (1974).

At the same time, Congress amended D.C. Code 24-301(d) to prescribe that a hearing be held 50 days after the initial commitment of an insanity acquittee to determine whether continued commitment of the patient is warranted. See page 4 and note 1, supra. Such a hearing had been held constitutionally required in cases arising under the pre-1970 form of the insanity defense, because automatic commitment would otherwise follow whenever the government failed to prove insanity at the time of the crime beyond a reasonable doubt--a showing deemed an insufficient index of need for commitment upon acquittal to pass an equal protection challenge grounded on the difference between this procedure and the civil commitment procedure. See note 4, supra. Bolton v. Harris, supra, 130 U.S. App. D.C. at 7-11, 395 F.2d at 648-652.

The 1970 Act also clarified Section 301(d) to make explicit that, as this Court had held in Lynch v. Overholser, supra, commitment under Section 301(d) does not follow from an insanity acquittal unless the defense was pressed by the defendant. See United States v. Wright, 167 U.S. App. D.C. 309, 511 F.2d 1311 (1975).

prescribed by D.C. Code 21-545 for persons committed in proceedings not triggered by acquittal of a crime by reason of insanity (hereinafter "civil committees"). 12/ Contrary to petitioner's contention, the court of appeals' decision does not conflict with any decision of this Court. Nor does it conflict with the decisions of the United States Court of Appeals for the District of Columbia Circuit upon which petitioner relies. There is accordingly no occasion for further review.

1. Petitioner first contends (Pet. 7-8), relying upon Addington v. Texas, supra, that his commitment deprived him of his liberty without due process because the government was not required, under D.C. Code 24-301(d), to establish by clear and convincing evidence that he was mentally ill and dangerous to himself or others. 13/ Petitioner's reliance upon Addington is misplaced. Unlike Addington, whom the State of Texas sought to commit civilly, petitioner had, prior to commitment,

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12/ Technically, of course, proceedings under Section 301(d)(2) are also civil proceedings (see Pet. App. C 10 n.10).

13/ In the court of appeals petitioner's argument focused upon the duration of his commitment, rather than the validity of the procedure by which he was initially committed. See notes 6 and 7, supra. This Court rendered its decision in Addington v. Texas, supra, subsequent to reargument to the court of appeals panel, but prior to entry of the panel's second opinion. No supplemental brief addressing Addington or advancing a due process claim was submitted to the panel by petitioner. Nor did petitioner submit a supplemental brief on the Addington issue to the en banc court of appeals. We are informed, however, that petitioner's counsel did discuss Addington in some measure at oral argument before the en banc court of appeals. These circumstances no doubt account for the brevity of the en banc court of appeals' discussion of the issue relating to the validity of the initial commitment, which was evidently not perceived to be the basis of an independent claim (see Pet. App. C 15-16). Although we believe that the due process argument pressed by petitioner in this Court is adequately addressed by the opinion below, it is also true that these contentions were not raised below in their present form. The Court may accordingly wish to treat them as not properly preserved for its review.

affirmatively pleaded mental illness as a defense to the crime charged and had carried the burden of proving that mental illness constituting legal insanity was the cause of his criminal act. Petitioner further agreed--as he acknowledges here (Pet. 12)--that he had in fact committed the criminal act charged. 14/ Finally, petitioner was provided a prompt and fair hearing at which he was unable to demonstrate that he was no longer dangerously mentally ill. 15/ At petitioner's 50-day release hearing, affirmative proof of the basis for continued confinement was produced--a report from the Superintendent of St. Elizabeths stating that petitioner was still suffering from schizophrenia and concluding that his release would endanger himself and others (Pet. App. C 5 n.5). Thus, contrary to petitioner's contention

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14/ D.C. Code 24-301(d) applies only when an acquittal is based solely upon a finding of insanity. A jury verdict of acquittal resting solely upon such a finding is required to contain a statement to that effect. D.C. Code 24-301(c).

15/ The court of appeals interpreted the substantive standard for commitment under Section 301(d) to be "identical" to that prescribed by D.C. Code 21-545(b) for civil committees (Pet. App. C 15). Accordingly, we assume that continued commitment would not result if, in the 50 day release hearing, an insanity acquittee were to demonstrate either that he is no longer insane at all, or that although he remains in some degree mentally ill, he is no longer dangerous to himself or others. See note 1, supra.

Decisions of the District of Columbia Circuit regarding the standards for release from commitment under Sections 301(e) and 301(g) (see note 1, supra) are in some disarray. Compare Dixon v. Jacobs, 138 U.S. App. D.C. 319, 325, 427 F.2d 589, 595 (1970), with 138 U.S. App. D.C. at 331-333, 427 F.2d at 601-603 (Leventhal, J., concurring), and United States v. Ecker, supra, 177 U.S. App. D.C. at 47-52, 543 F.2d at 194-199. Insofar as these decisions suggest that the standard for commitment under Section 301(d) differs from that applied in civil commitments, they reflect an interpretation of D.C. Code 24-301(d) which must be treated as nonauthorative in the face of the District of Columbia Court of Appeals' conclusion that the standards for commitment are "identical." See M.A.P. v. Ryan, 285 A.2d 310, 311-312 (D.C. App. 1971).

In any event, petitioner has not claimed that the standard for commitment was improperly applied in his case, nor has he appealed from the denial of his application for release under Section 301(k). See note 5, supra. Accordingly, petitioner's claim that his commitment does not rest upon determinations equivalent to those made in civil commitment proceedings is unfounded.

(Pet. 7), his continued commitment rests upon a determination that he is presently dangerously mentally ill. 16/

In fixing the constitutionally acceptable level of proof for ordinary civil commitment proceedings in Addington, the Court balanced the individual's interest in minimizing the risk of an unwarranted commitment against "the state's interest in committing the emotionally disturbed under a particular standard of proof." 441 U.S. at 425; see Parham v. J.R., 442 U.S. 584, 599-600 (1979). The special position of one who has successfully pleaded the insanity defense to a criminal charge necessarily affects the balance to be struck. The government's interest in confining such persons for treatment and for the protection of society is unmistakable. 17/ Such persons have been found, beyond a reasonable doubt, to have committed an act that Congress has determined (by enactment of a criminal statute) to

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16/ Petitioner seemingly disregards the 50-day release hearing entirely in his due process argument. However, it is only petitioner's initial commitment for evaluation which rests solely upon the acquittal by reason of insanity. Such commitment for a reasonable evaluation period has been uniformly upheld. See, e.g., Ragsdale v. Overholser, supra, 108 U.S. App. D.C. at 313, 281 F.2d at 948; Bolton v. Harris, supra, 130 U.S. App. D.C. at 10, 395 F.2d at 651; In re Franklin, 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972); People v. Chavez, 629 P.2d 1040, 1046-1050 (Colo. 1981); People v. McQuillan, 392 Mich. 511, 525-529, 221 N.W. 2d 569, 575-577 (1974). Petitioner apparently did not challenge the validity of his initial commitment in the court of appeals. See notes 6, 7 and 13, supra. Nor has petitioner expressly challenged the initial commitment for evaluation in the petition. In any event, the government clearly has a compelling interest in confining persons, found to be dangerously insane by the trier of fact in a criminal trial, for a brief period of evaluation. See McNeil v. Director, Patuxent Institution, 407 U.S. 245, 249-250 (1972). Although those findings, strictly speaking, relate to a time in the recent past, they provide a reasonable basis for holding the insanity acquittee for observation needed to determine whether the acquittee remains dangerous and insane.

17/ A statutory right to treatment conferred by D.C. Code 21-562 has been extended to insanity acquittees by judicial decision. See Tribby v. Cameron, 126 U.S. App. D.C. 327, 379 F.2d 104 (1967); House v. Cameron, 125 U.S. App. D.C. 366, 373 F.2d 451 (1966).

be dangerous to society. 18/ This affirmative finding of the commission of a dangerous act resulting from mental illness differs from the often unavoidably speculative findings in civil commitment proceedings that the individual is dangerous to himself or to others. Compare Addington v. Texas, supra, 441 U.S. at 426-427; see In re Franklin, 7 Cal. 3d 126, 137, 496 P.2d 465, 471, 101 Cal. Rptr. 553, 559 (1972); Chase v. Kearns, 278 A.2d 132, 134-135 (Me. 1971). Note, Stopping the Revolving Door: Adopting a Rational System for the Insanity Defense, 8 Hofstra L. Rev. 973, 1015-1016 (1980). In addition to the

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18/ Petitioner's contention (Pet. 8), that the particular crime with which he was charged, petty larceny, does not "demonstrate the sort of dangerousness which can justify an indeterminate commitment under the District of Columbia's civil commitment statute," is misconceived. First, petitioner "confuse[s] danger with violence." Overholser v. O'Beirne, 112 U.S. App. D.C. 267, 276, 302 F.2d 852, 861 (1962). Petitioner does not question Congress's power to punish petit larceny--here shoplifting--by the criminal sanction. Accordingly, there is no room to question Congress's judgment that D.C. Code 24-301(d) should apply irrespective of the offense charged. As the District of Columbia Circuit has explained:

> Larceny is usually less violent than murder or assault, but in terms of public policy the purpose of the statute is the same as to both. Larceny, assault and murder are all dangerous; they are simply different areas of prohibited conduct. Hence unless we are to ignore the objectives and policies of the statute in question, the release provisions must apply in the same way and with the same force to larceny without violence as to a crime of violence until Congress speaks otherwise. [Overholser v. O'Beirne, supra, 112 U.S. App. D.C. at 276, 302 F.2d at 861.]

Moreover, petitioner's continuing commitment does not rest solely upon the fact that he performed a dangerous criminal act. Rather, the commitment rests upon petitioner's failure to show that he was no longer dangerously mentally ill. D.C. Code 24-301(d)(2). See notes 15 and 16, supra. There is accordingly no merit to petitioner's contention that his continuing commitment rests upon an inadequate foundation with regard to his dangerous propensities.

special indicia of dangerousness present, persons such as petitioner have, of course, been affirmatively found, by a preponderance of the evidence, to have been mentally ill at the time of the criminal act.

These circumstances may properly be considered in determining the nature and timing of additional process due the insanity acquittee. 19/ The risk that an insanity acquittee will be erroneously held as dangerously insane after the release hearing mandated by Section 301(d)(2) is substantially reduced by the prior determinations of insanity and dangerousness. Due process accordingly does not require that a burden of proving continued dangerous mental illness by clear and convincing evidence be placed upon the government in the release hearing. The fact that petitioner's insanity was permitted to be established by a preponderance of the evidence at his trial is, as the court of appeals noted (Pet. App. C 21), for his benefit. 20/ But once the acquittee has been permitted to establish his mental illness and its connection to his demonstrated dangerousness

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19/ As the Court noted in Lynch v. Overholser, supra, 369 U.S. at 715, in distinguishing such persons from those who have not sought to avoid criminal responsibility by a plea of insanity:

> The criminal defendant who chooses to claim that he was mentally irresponsible when his offense was committed is in quite a different position. * * * Congress might have thought * * that having claimed insanity to avoid punishment, the accused should then bear the burden of proving that he is no longer subject to the same mental abnormality which produced his criminal acts.

20/ A higher burden of proof of insanity could be placed upon defendants, consistent with due process. Leland v. Oregon, 343 U.S. 791 (1952); Rivera v. Delaware, 429 U.S. 877 (1976) (dismissal for want of a substantial federal question); see Patterson v. New York, 432 U.S. 197, 205 (1977).

by a preponderance of the evidence, the government has a compelling interest in assigning to the acquittee the burden of proving, to a similar degree of certainty, that these conditions no longer obtain. To impose upon the government a higher burden to prove that these conditions remain operative following the acquittal would reopen the "revolving door" by which persons proven both dangerous and mentally ill escape both punishment and treatment. See note 11, supra. Accordingly, the balancing analysis employed in Addington v. Texas, supra, does not support petitioner's contention that he has been denied due process. On the contrary, a substantial public interest justifies the procedure by which the continuing necessity for petitioner's commitment was determined.

2. Relying upon Baxstrom v. Herold, 383 U.S. 107 (1966), petitioner contends (Pet. 9-12) that his commitment cannot, consistent with equal protection, extend beyond the term of imprisonment he could have received if he had been convicted of the crime charged. Petitioner does not rest his argument upon the court of appeals panel's conclusion (see Pet. App. B 13)--rejected by the en banc court--that the commitment under Section 301(d) serves a "partially punitive" purpose whose force expires at the end of a hypothetical maximum sentence (see Pet. 12). 21/

21/ That conclusion, shared by two members of the court of appeals' panel and by the dissenting judges on rehearing en banc, is untenable. A disability imposed by the government is not punishment if it is "an incident of some other legitimate government purpose"--if "an alternative purpose to which [the disability] may rationally be connected is assignable for it, and [the disability is not] excessive in relation to the alternative purpose assigned [to it]." Bell v. Wolfish, 441 U.S. 520, 538 (1979), quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963). The non-punitive purpose of commitment under Section 301(d) is clear from its legislative history. As the District of Columbia Circuit stated in Hough v. United States, 106 U.S. App. D.C. 192, 195, 271 F.2d 458, 461 (1959): "[T]he basic policy underlying the statute * * * as we read the legislative history, (Continued)

Rather, petitioner asserts (ibid.) that, whatever the purpose of his confinement, considerations of equal protection require that he be recommitted by de novo civil proceedings if he is to be held once his hypothetical maximum sentence has expired.

a. Petitioner's reliance upon Baxstrom v. Herold is misplaced. In Baxstrom the petitioner was convicted of a criminal offense and sentenced to a term of imprisonment. During that term he was "certified" to be insane by a prison physician and was transferred to a forensic hospital operated by the state prison authority. No hearing or adversary process of any kind was afforded him. Compare Vitek v. Jones, 445 U.S. 480 (1980). Shortly before his sentence expired a hearing was held at which a judge determined that Baxstrom "may require mental care and treatment." See 383 U.S. at 109. On the basis of this finding Baxstrom remained committed to the forensic hospital beyond the expiration date of his sentence. This Court held that Baxstrom had been denied equal protection by his civil commitment at the end of his sentence without the opportunity for a jury

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is to provide treatment and cure for the individual in a manner which affords reasonable assurance for the public safety * * *." Such confinement is "not for punishment since the very purpose of providing such a verdict [of not guilty by reason of insanity is] to excuse the act and relieve the actor from penalties." Overholser v. O'Beirne, supra, 112 U.S. App. D.C. at 268, 302 F.2d at 853; accord, United States v. Ecker, 156 U.S. App. D.C. 223, 228, 479 F.2d 1206, 1211 (D.C. Cir. 1973); Collins v. Cameron, 126 U.S. App. D.C. 306, 308, 377 F.2d 945, 947 (D.C. Cir. 1967); Ragsdale v. Overholser, 108 U.S. App. D.C. 308, 312, 281 F.2d 943, 947 (1960); Hough v. United States, supra, 106 U.S. App. D.C. at 196, 271 F.2d at 462.

As the court of appeals recognized (Pet. App. C 11), the fact that commitment under Section 301(d) is partly predicated on the commission of a crime does not make it penal. Persons who have manifested dangerousness by committing criminal acts as a result of mental illness are not hospitalized because they need punishment, but because of the heightened risk they present of repetition of such acts, unless they are treated. Thus, as the court of appeals stated, "There is no evidence that the District of Columbia statutory scheme for commitment of insane criminals is anything but a regulatory, prophylatic statute, based on a legitimate governmental interest in protecting society and rehabilitating mental patients" (Pet. App. C 11).

determination of the need for commitment, afforded to all others civilly committed under state law. 383 U.S. at 110-112. The Court held further that Baxstrom was denied equal protection by his commitment to a forensic institution (rather than a mental hospital operated by civil authorities) without a judicial determination, such as is afforded to ordinary civil committees being considered for such treatment, that he was so dangerously mentally ill as to require confinement in such an institution. 383 U.S. at 110, 112-115. Baxstrom, in the Court's view, was indistinguishable from a non-criminal facing civil commitment, since neither person has been provided any prior opportunity for a jury determination of mental illness. 383 U.S. at 111-112.

The Baxstrom Court recognized, however, that "[e]qual protection does not require that all persons be dealt with identically," holding only that "it does require that a distinction made have some relevance to the purpose for which the classification is made." 383 U.S. at 111 (citation omitted). That test is satisfied here. The provisions of D.C. Code 24-301(d) applied to petitioner are tellingly different from the procedures applied to Baxstrom. And petitioner's status is different in key respects from Baxstrom's (or from that of a civil committee). Most significantly, unlike Baxstrom, petitioner was determined to be dangerously insane by the court in adversary proceedings. A jury trial was available to petitioner, 22/ and petitioner had the right to be and was represented by counsel in this proceeding, unlike Baxstrom. See 383 U.S. at 109 n.1. Moreover, at the close of the statutory period of evaluation following his insanity acquittal, petitioner was afforded a hearing to determine the need for continued

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22/ Had petitioner exercised that right, the jury would have been instructed as to the consequences of an acquittal by reason of insanity, unless petitioner requested that the instruction be omitted. See United States v. Brawner, supra, 153 U.S. App. D.C. at 41-42, 471 F.2d at 1009-1010.

confinement. Again he was represented by counsel, a right guaranteed by the statute. D.C. Code 24-301(d)(2).

Petitioner was not afforded a jury trial, such as is available to civil committees, at this second juncture. That procedural difference, however, is justifiable, as the court of appeals held (Pet. App. C 17-19), because of the earlier opportunity for a jury determination respecting petitioner's sanity at the time of his crime. 23/ As the court of appeals explained (Pet. App. C 20-22), other differences between the two procedures are also justified by substantial state interests, intimately related to the special status of an insanity acquittee. Once an individual has been determined to be dangerously insane, it is reasonable to place upon him the burden of proving that he has recovered, especially where that burden is commensurate with the burden previously borne of establishing that his insanity caused him to commit a criminal act. 24/ Thus, unlike Baxstrom, petitioner has been afforded the protection of procedures that are the equivalent of those afforded to civil committees, for the purpose of determining the relevant fact--i.e., whether or not he is dangerously mentally ill.

b. Other decisions of this Court cited by petitioner (Pet. 3) do not support his contentions. Jackson v. Indiana, 406 U.S.

23/ Petitioner nowhere addresses the court of appeals' detailed analysis of this and the other procedural differences between the civil commitment process and the procedures prescribed by Section 301(d), or the court's discussion of the circumstances that justify them, merely arguing conclusorily that those differences are "crucial" (Pet. 11).

24/ Petitioner simply ignores the prior determination of insanity in his equal protection argument, which focuses on the release hearing viewed in isolation (see Pet. 11). Curiously, petitioner ignores the release hearing in his due process argument. See note 16, supra. Indeed, the fundamental flaw in petitioner's argument is the failure to view the Section 301 procedures as an integrated whole.

715 (1972), proscribes indefinite commitment of one charged with a criminal offense but found incompetent to stand trial. The Court found a denial of equal protection in the indefinite detention of a defendant resting on application of different standards from those applied to civil commitments (inability to participate in legal proceedings as contrasted to dangerousness). 406 U.S. at 723-730. Here, however, the standard applied to petitioner is identical to that applied to civil committees--continued commitment rests on a finding of mental illness and dangerousness for both types of committees. See note 15, supra. Jackson also found a denial of due process in a commitment, premised solely upon the pendency of criminal charges, of an individual unable to attain competency for trial. 406 U.S. at 738. The Court did not question the state's power to commit such a person upon a showing of dangerous mental illness--noting only that Indiana had not detained Jackson on that basis. 406 U.S. at 737. Here, unlike Jackson, 406 U.S. at 738, the "nature and duration of commitment bear[s] some reasonable relationship to the purpose for which the individual is committed."

McNeil v. Director of Patuxent Institution, 407 U.S. 245 (1972), and Specht v. Patterson, 386 U.S. 605 (1967), are also inapposite here. In Specht, the defendant was convicted of a sexual offense but, in lieu of an ordinary term, was "sentenced" to an indeterminate term of confinement under a separate procedure applicable to sex offenders. No opportunity for a hearing at which defendant might present evidence or confront adverse witnesses with respect to the need for such confinement was allowed. The Court found a denial of due process because punishment was imposed, in a proceeding separate from the criminal trial, based upon a finding of fact as to the defendant's dangerous propensities which he had not been allowed to litigate. 386 U.S. at 608-610. Here, by contrast, petitioner was afforded a full and fair hearing on the questions on which

his commitment turned. In McNeil, supra, the defendant was sentenced to a fixed term upon conviction of a crime and was referred for evaluation of his mental and emotional health on the basis of an ex parte judicial determination. The Court concluded that the defendant could not be held for evaluation beyond the end of his five-year sentence, as there had been no judicial determination that confinement beyond that time was warranted. Here, of course, petitioner's confinement rests upon the judicial determination that he presently remains dangerously mentally ill.

Finally, the court of appeals properly distinguished (Pet. App. C 22) Humphrey v. Cady, 405 U.S. 504 (1972). There the defendant had been convicted of a crime and committed to a sex deviate facility in the state prison in lieu of sentence. Under the Wisconsin statute at issue, such a commitment ran for the duration of the sentence, but could be renewed for an unlimited number of five-year terms upon a finding of need for continued treatment at the conclusion of the preceding term. The prisoner challenged his continuing commitment under this statute by petition for a writ of habeas corpus. This Court's holding was only that his claims were substantial enough to warrant a hearing. 405 U.S. at 508. The prisoner argued that, as a matter of equal protection, he was entitled to a jury trial, such as was provided to civil committees, at least at the hearing held to determine whether his commitment should be renewed. The state suggested that the difference was justified by the fact that the commitment was merely an alternative form of sentencing. In concluding that the prisoner's contention was not so insubstantial as to justify the district court's dismissal of the

prisoner's petition, the Court remarked that the justification proffered by the state

> arguably has force with respect to an initial commitment * * * which is imposed in lieu of sentence, and is limited in duration to the maximum permissible sentence. The argument can carry little weight, however with respect to the subsequent renewal proceedings, which result in five-year commitment orders based on new findings of fact, and are in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime. [405 U.S. at 510-511; footnote omitted.]

These comments do not support petitioner's contention that his commitment must terminate with the expiration of his sentence, for petitioner's confinement does not rest upon conviction of a crime, nor is his commitment a sentencing alternative. Rather, petitioner's initial commitment was triggered by an acquittal which embodied a finding of dangerous insanity--the very facts which support civil commitments. Thus, unlike Humphrey, petitioner has had an opportunity for jury review of these key questions. The omission of an opportunity for a jury trial at the 50-day release hearing is accordingly permissible.

c. Petitioner's errs in asserting (Pet. 3) that the decision below conflicts with several decisions of the District of Columbia Circuit. In Bolton v. Harris, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968), the D.C. Circuit engrafted the requirement of a hearing to determine continuing insanity upon Section 301(d), which, at the time, had no such provision. See note 11, supra. The Court further held that "persons found not guilty by reason of insanity must be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings"--including "[w]here feasible * * * notice, counsel, jury trial etc. * * *." 130 U.S. App. D.C. at 10 and note 50, 395 F.2d at 651 and note 50. However, in Bolton, the acquittee

seeking release had been committed automatically following his acquittal by reason of insanity under the standard applied prior to 1970 in the District of Columbia. That standard required acquittal whenever there was a reasonable doubt as to a defendant's sanity. See note 11, supra. Bolton turns essentially upon the fact that, absent a post-acquittal hearing, there would be no affirmative determination of mental illness. 130 U.S. App. D.C. at 9, 395 F.2d at 650. Bolton is doubly inapposite to the present Section 301(d), which provides such a hearing and which is applicable only after an affirmative jury or jury-waived finding of insanity. 26/ While the 1970 amendments to Section 301(d) (see note 11, supra) do not track the procedure promulgated by the D.C. Circuit in every detail, that court has repeatedly declined to intimate any view as to whether any constitutional defect remains. See United States v. Brawner, 153 U.S. App. D.C. 1, 30 n.51, 471 F.2d 969, 998 n.51 (1972) (en banc); United States v. Wright, 167 U.S. App. D.C. 309, 311 n.9, 511 F.2d 1311, 1313 n.9 (1975); United States v. Jackson, 179 U.S. App. D.C. 375, 382 n.13, 553 F.2d 109, 116 n.13 (1976); United States v. Henry, 195 U.S. App. D.C. 110, 111-112 & note 7, 600 F.2d 924, 925-926 & note 7 (1979). 27/

26/ In Bolton the D.C. Circuit purported merely to interpret Section 301(d) by engrafting the hearing requirement. 130 U.S. App. D.C. at 11, 395 F.2d at 652. Of course, to the extent that the decisions of the D.C. Circuit relied upon by petitioner rest upon an interpretation of local law, the decision of the local court of appeals must be deemed controlling, rather than conflicting, see M.A.P. v. Ryan, 285 A.2d 310, 311-312 (D.C. App. 1971), especially inasmuch as the decision below was rendered by the en banc court, id. at 312.

27/ Several provisions of the 1970 District of Columbia Court Reform and Criminal Procedure Act (see note 11, supra) reduced the number of occasions that thereafter arose for the D.C. Circuit to pass upon the interpretation or constitutionality of Section 301(d). First, the Act expanded the criminal jurisdiction of the District of Columbia courts to encompass all (Continued)

Petitioner's reliance upon Waite v. Jacobs, 154 U.S. App. D.C. 281, 475 F.2d 392 (1973), and United States v. Brown, 155 U.S. App. D.C. 402, 478 F.2d 606 (1973), is similarly misplaced. In both cases the court considered commitments resulting from insanity acquittals under the reasonable doubt standard in effect prior to the 1970 changes in the operation of the insanity defense in the District of Columbia (see note 11, supra). In Waite the court suggested, in dictum, that considerations of equal protection might compel the government to release an insanity acquittee, committed solely on the basis of a reasonable doubt as to sanity, whose maximum hypothetical sentence had expired, unless the patient was recommitted in a fresh civil proceeding. The suggestion rested upon the fact that, under the pre-1970 insanity defense and the terms of Section 301(d) prior to 1970, an insanity acquittee had never been affirmatively determined to be mentally ill, and the fact that Bolton was not applied retroactively to provide hearings to insanity acquittees committed prior to the date of that decision. See Waite v. Jacobs, supra, 154 U.S. App. D.C. at 287-289, 475 F.2d at 398-400; Bolton v. Harris, supra, 130 U.S. App.

violations of the D.C. Code and eliminated federal district court jurisdiction of major offenses under the D.C. Code. Second, the appellate jurisdiction of the D.C. Circuit over cases in the D.C. Court of Appeals was abolished. See H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 23, 30-35 (1970); M.A.P. v. Ryan, supra, 285 A.2d at 311-312. Finally, Section 301 was amended to create a statutory proceeding (Section 301(k)) by which release may be sought in the committing court. Exhaustion of this remedy is a prerequisite to consideration of any petition for habeas corpus. D.C. Code Section 24-301(k)(7). This provision has diverted such cases from the D.C. Circuit. See Johnson v. Robinson, 166 U.S. App. D.C. 62, 509 F.2d 395 (1974).

D.C. at 12-13, 395 F.2d at 653-654. The intervening statutory changes render the Waite dictum inapposite here. Indeed, the court declined to express any view as to "whether the considerations we have adverted to apply to post-Bolton acquittees whose maximum sentence periods have expired." 154 U.S. App. D.C. at 390 n.18, 475 F.2d at 401 n.18.

United States v. Brown, supra, again involved an individual acquitted, prior to the effective date of the 1970 amendments to Section 301, on the basis of a reasonable doubt as to his sanity. The decision in Bolton had, by that time, been rendered, and the acquittee was accordingly afforded a "Bolton hearing" to determine his present insanity and dangerousness. At that hearing a jury determined, by a preponderance of the evidence, that the standard for commitment was met. In Brown the D.C. Circuit rejected acquittee's contention that the government was required to establish dangerous mental illness by proof beyond a reasonable doubt. Prefiguring Addington v. Texas, supra, the court suggested that proof by clear and convincing evidence (but not more) might be required in civil commitments, but held that use of a preponderance of the evidence standard under Section 301(d) was consistent with equal protection. 155 U.S. App. D.C. at 404-407, 478 F.2d at 608-611. 28/ Although the court noted its view that denial of a jury trial would not be justifiable, 155 U.S. App. D.C. at 407, 478 F.2d at 611, that dictum has no application to commitments such as petitioner's, which rest, in part, on a finding of dangerous insanity in a criminal trial in which a jury was available. Indeed, the court again declined to consider the effect of the 1970 amendments to Section 301. 155

28/ The court declined to intimate any view upon the constitutional adequacy of a procedure used by California substantially similar to that established by the present D.C. Code 24-301. See 155 U.S. App. D.C. at 407 n.11, 478 F.2d at 611 n.11.

U.S. App. D.C. at 404 n.3; 478 F.2d at 608 n.3. Brown also repeats, in dictum, the suggestion that at some point, such as the expiration of the hypothetical maximum sentence an acquittee could have received if convicted, continued commitment must rest upon recommitment in fresh civil proceedings. 155 U.S. App. D.C. at 408, 478 F.2d at 612. The present case is to be distinguished in this respect, however, for unlike Brown, petitioner was committed, in part, upon an affirmative finding of insanity by the trier of fact in his criminal trial. Moreover, as is indicated above, the D.C. Circuit has repeatedly declined to pass upon the constitutionality of Section 301(d) in its present form. There is accordingly no conflict of decisions warranting review by this Court at this time.

d. Once the presence of dangerous mental illness has been established by procedures that comport with due process and are reasonably adjusted to the unique situation of an insanity acquittee, the only remaining question is whether the procedures by which the continuing need for a commitment of an insanity acquittee is determined are constitutionally adequate. No equal protection claim can be fashioned on that score, however, for both the standard for release (proof that the patient is no longer dangerously mentally ill) and the burden of proof (upon the patient seeking release, by a preponderance of the evidence) appear to be identical. See notes 1, 4 and 15, supra; cf. O'Connor v. Donaldson, 422 U.S. 563, 573 (1975). In any event, no equal protection challenge to the release procedures applicable to petitioner has been raised in this Court, and none was raised below (see Pet. App. C 5 and 17 n.19). See also note 15, supra.

The expiration of the maximum sentence that petitioner could have received if convicted is, as the court of appeals held (Pet. App. C 8-9), simply irrelevant to the permissible duration of petitioner's commitment, for unlike petitioners in Specht, Humphrey and McNeil, petitioner's confinement does not rest upon such a conviction. Rather, his commitment rests upon the finding of fact--reached by an appropriate procedure--that he is dangerously mentally ill. The validity of that finding, twice made at the outset of his confinement, and reviewable at regular intervals upon petitioner's application, does not somehow decay over time in a manner not applicable to civil committees. Nor is that finding dissipated by the expiration of the maximum sentence petitioner could have received. There is accordingly no warrant for requiring the government to bear the burden of proving continued dangerous insanity by recommitting insanity acquittees after the passage of a certain amount of time--a right not afforded civil committees. To do so might raise equal protection questions more substantial than those suggested by petitioner.

Petitioner's argument takes no account of the unique position of insanity acquittees. He assumes that he must be treated in all respects as a convicted criminal or in all respects as a civil committee, when in fact he is neither. The District of Columbia procedure for commitment of insanity acquittees provides a procedurally sound means of determining whether the standard for commitment has been met. The differences between these procedures and those prescribed for civil committees are carefully designed to reflect the special position of an insanity acquittee, who has been permitted to escape the penal sanction on the basis of his showing by a preponderance of the evidence that he was afflicted with a dangerous mental illness. Equal protection requires no more. See Parham v. J.R., supra, 442 U.S. at 599-600.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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